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No. 74-1556

In the Supreme Court of the United States

OCTOBER TERM, 1975

DUANE LEE VINCENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, an attorney, was charged in a three-count information with having willfully failed to file federal income tax returns for the years 1968, 1969, and 1970, in violation of 26 U.S.C. 7203. The information alleged that petitioner's gross income for 1968 was $13,929; that his gross income for 1969 was $22,393.17; and his gross income for 1970 was $23,515 (App. 3-4).[1] Petitioner entered a plea of guilty to Count III, and the other two counts were dismissed on the government's motion. The court sentenced petitioner to twelve months' imprisonment (App. 35). The court of appeals affirmed (Pet. App. 1a-2a).

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[1] "App." refers to the appendix filed in the court of appeals.

The judgment of the court of appeals was entered on February 20, 1975 (Pet. 1; Pet App. 1a), and the petition for a writ of certiorari was filed on June 10, 1975. The petition is therefore substantially out of time under Rule 22(2) of the Rules of this Court.[2]

Petitioner's sole contention is that he was improperly sentenced to one year in prison on his plea of guilty. But the sentence was within the limitations set forth in 26 U.S.C. 7203. There is accordingly no basis for review of the sentence. See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424, 431; *Gore* v. *United States*, 357 U.S. 386, 393; *Townsend* v. *Burke*, 334 U.S. 736, 741.

Contrary to petitioner's argument (Pet. 5), the trial court considered all the relevant facts in imposing sentence upon him. Following entry of the plea of guilty, petitioner's counsel presented the court with a pre-sentence memorandum (App. 18). The court thereupon heard four witnesses who testified on behalf of petitioner (App. 18-30). The court also considered a pre-sentence report and was aware that petitioner had eventually filed the return in question and paid the $2,548 of taxes due (App. 34). Before pronouncing sentence, the court spoke of its knowledge of petitioner and his family (App. 32-33) and commented on the testimony given by petitioner's witnesses (App. 34). Taking all of these facts into consideration, the court determined that a sentence of twelve months was appropriate in this particular case (App. 35).

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[2]On March 5, 1975, petitioner filed in the court of appeals a motion for an extension of time in which to file a petition for rehearing. This motion was denied on March 28, 1975 (Pet. 1).

United States v. *Daniels*, 446 F.2d 967 (C.A. 6), and *United States* v. *McKinney*, 427 F.2d 449 (C.A. 6), relied upon by petitioner (Pet. 5, 7), are not in point. In those cases, the court found that maximum sentences had been imposed without regard to the circumstances of the individual defendants. *Williams* v. *New York*, 337 U.S. 241; *United States* v. *Moody*, 371 F.2d 688 (C.A. 6). Here, however, petitioner has merely disagreed with the sentencing court with respect to the effect the alleged mitigating circumstances should have had on his sentence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.